

(10)

Office - Supreme Court, U. S.

FILED

JUN 16 1943

CHARLES ELMORE CROPLEY
CLERK

IN THE
Supreme Court of the United States

..... Term, 194

No. **1097** **106**

J. L. SEIDENBACH, *Petitioner*,

v.

MARYLAND CASUALTY COMPANY, a corporation, *Respondent*.

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the
Tenth Circuit.

INDEX.

	Page
Opinions below	2
Jurisdiction	2
Questions presented	2
Statute involved	4
Statement	4
Specification of errors to be urged	11
Reasons for granting the writ	13
Conclusion	16
Appendix	17

CITATIONS.

Cases:

<i>Consolidated Cut Stone Co. v. Seidenbach</i> , 181 Okl. 528, 75 P. (2d) 442	9
---	---

Statutes:

<i>Oklahoma Statutes</i> , 1931, Sec. 10980	17
---	----

IN THE

Supreme Court of the United States

..... Term, 194

No.

J. L. SEIDENBACH, *Petitioner*,

v.

MARYLAND CASUALTY COMPANY, a corporation, *Respondent*.

PETITION FOR WRIT OF CERTIORARI

**To the United States Circuit Court of Appeals for the
Tenth Circuit.**

Your petitioner prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Tenth Circuit, reversing the judgment of the United States District Court for the Western District of Oklahoma which allowed recovery on a bond executed by the Consolidated Cut Stone Company as principal, and the Maryland Casualty Company as surety.

OPINIONS BELOW.

The opinion of the court below is reported in 133 F. (2d) 573. The opinion of the United States District Court is printed on page 58 of the record.

A petition for rehearing and a second petition for rehearing were denied by the court below without opinion. (133 F. (2d) 573.)

JURISDICTION.

The judgment of the United States Circuit Court of Appeals for the Tenth Circuit was entered on October 27, 1942. (R. 71.) An order was entered November 23, 1942 (R. 71), extending the time for filing a petition for rehearing to December 21, 1942, which petition was denied on December 30, 1942. (R. 73.) On January 9, 1943, an order of the court below was entered which stayed the mandate for thirty days (R. 73) and on February 9, 1943 the court below granted an application to file a second petition for rehearing. (R. 74.) This second petition for rehearing was denied on March 17, 1943. (R. 83.) The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended.

QUESTIONS PRESENTED.

Respondent is surety on a supersedeas bond given to indemnify petitioner for the loss of use, pending appeal to the Oklahoma Supreme Court, of that portion of a deposit, made by him into court to discharge a materialman's lien, over and above the amount awarded by judgment of the trial court to the lien claimant. The supersedeas bond was filed by the lien claimant pursuant to leave granted at its request in order to obtain a stay, pending appeal by the lien claimant, of execution of the judgment of the District Court of Tulsa County. This judgment awarded to the lien claimant a portion of the amount claimed and directed its payment out of the deposit of the full amount claimed which petitioner had made to discharge the lien, and the return of

the balance of the deposit to petitioner. During the litigation in the trial court, withdrawals were made, by stipulation of the parties, from the funds deposited by petitioner for the payment of certain costs which were chargeable on a pro rata basis against the lien claimants. Consolidated Cut Stone's pro rata share of these costs was \$4,511.83. The trial court's order also, in effect, required the petitioner to deposit additional funds in the amount of the stone company's share of the costs which had been withdrawn by stipulation. No exception to or appeal from the order of the trial court fixing the bond was taken, nor was any question as to its validity raised in any of the further proceedings in the litigation on such lien claim in the state courts of Oklahoma. Nor did the lien claimant contend at any stage in such proceedings that petitioner would not have been entitled to a return of that portion of the deposit made by him which was over and above the amount awarded by the judgment of the trial court to the lien claimant in the absence of a stay of execution by the trial court.

The questions presented are:

1. Where an order of a state trial court directing the execution of a supersedeas bond is not excepted to or appealed from, and consequently, as between the beneficiary of such bond on the one hand and the principal and surety of such bond on the other hand, is *res adjudicate*, is the validity of such order subject to review in a subsequent suit on the bond commenced by the beneficiary in an Oklahoma state court and removed at the instance of the surety to a federal district court because of diversity of citizenship?

2. Where admittedly the amount of petitioner's deposit over and above the amount awarded to the lien claimant by the judgment of the trial court would have been returned to petitioner, and he would have enjoyed the use of such money during the more than eight years in which the lien claimant's appeal was pending in the Supreme Court of Oklahoma before it finally affirmed the judgment of the trial

court, had not the stay requested by the lien claimant conditioned upon the filing of the bond to indemnify petitioner against the loss of use of such money pending appeal been granted by the trial court, can a federal court properly consider and decide whether the return to petitioner of any of the deposit prior to final judgment of the Supreme Court of Oklahoma on appeal would have been unauthorized and that therefore the actual loss of use of the money did not constitute legal damage?

3. Whether, assuming the question of the validity of the stay order of the trial court which required the supersedeas bond here in litigation is open in a suit on the bond, the court below has not only improperly construed the applicable provisions of Oklahoma Statutes but has also construed them in a manner in conflict with the decisions of the Supreme Court of Oklahoma?

4. Whether, assuming the court below properly held the stay order of the trial court requiring the supersedeas bond to be invalid, respondent can now contend, inasmuch as that order required in substance and effect that petitioner deposit additional funds for the lien claimant's benefit in the amount of \$4,511.83, (the amount which by stipulation had been withdrawn from the deposit to meet costs chargeable to the lien claimant) that petitioner is not entitled to indemnification for the loss of use of at least the additional amount he was improperly required to deposit over and above the maximum amount required by statute?

STATUTE INVOLVED.

The relevant provisions of the statute involved are set forth in appendix I, *infra*, page 17.

STATEMENT.

These proceedings began with the institution of a suit by J. L. Seidenbach (herein referred to as "Seidenbach") against the Maryland Casualty Company (herein referred to as "Casualty") in the District Court of Oklahoma

County (R. 4), from which, at the instance of Casualty, the cause was removed to the United States District Court for the Western District of Oklahoma. (R. 26.) The action was to recover interest accumulated on the difference between the amount deposited by Seidenbach with the court clerk of the District Court of Tulsa County to discharge the lien of the Consolidated Cut Stone Company (herein called "Cut Stone"), and the amount awarded by the trial court to Cut Stone pending determination of Cut Stone's appeal to the Supreme Court of Oklahoma. Cut Stone's lien arose out of sums alleged to be due it from J. W. Wilson who had contracted with Seidenbach for the construction of a building upon which contract Wilson defaulted and, as a result of which default, Seidenbach took over the construction of the building and completed it. (R. 5.)

Cut Stone's lien claim was filed, together with other lien claims, in accordance with the lien statutes of Oklahoma, which provide (Section 10980, Oklahoma Statutes, 1931) that any person against whom a mechanic's or materialman's lien is filed may discharge such lien by depositing with the court clerk the amount of such claim in cash and by executing and filing with such court clerk a bond conditioned that such person will pay attorneys' fees, court costs, and interest, which may be adjudged against him finally in the event that the claimant recovers judgment on the claim in the amount for which the claim is filed.

In accordance with Section 10980, Oklahoma Statutes, 1931, Seidenbach discharged the liens by depositing the amounts of the several lien claims and by filing bonds as required by the statutes. (R. 5.)

After extensive hearings before a referee, the District Court of Tulsa County, Oklahoma, on March 8, 1930, awarded judgment in favor of certain lien claimants against the general contractor Wilson, including one judg-

ment in the amount of \$16,355.18 in favor of Cut Stone. (R. 10, 11.) The court directed the clerk, after first deducting costs of \$13,194.15, to pay to the several lien claimants from the funds deposited by Seidenbach amounts computed on the basis of 19.471% of the respective allowed claims and to pay the balance of the deposit remaining to Seidenbach. The amount thus directed to be paid to Cut Stone was \$3,184.46.

From this judgment of the District Court of Tulsa County, Oklahoma, Cut Stone and other lien claimants appealed to the Supreme Court of Oklahoma. (R. 33.) Cut Stone asked leave to file a supersedeas bond. (R. 56.) The District Court of Tulsa County granted the leave requested (R. 56), fixed the amount of the supersedeas bond of Cut Stone at \$12,500 (R. 15), and fixed the condition of the bond which was that the surety, Casualty, should pay to Seidenbach "all interest, costs and damages suffered by the defendant, J. L. Seidenbach, by reason of the staying of the execution of said order, judgment and decree herein, in case said judgment appealed from shall be affirmed in whole or in part in favor of J. L. Seidenbach * * *" (R. 16.) A copy of the supersedeas bond appear in Appendix II, page 17, *infra*.

On appeal, the Supreme Court of Oklahoma affirmed the judgment of the District Court of Tulsa County, Oklahoma with certain modifications, which resulted in reducing Cut Stone's recovery from \$3,184.46 to \$1,143.48. (R. 40.)

This case against Casualty, for the accumulated interest on the difference between the amount originally deposited to discharge the lien of Cut Stone and the amount awarded by the trial court to Cut Stone, was tried in the District Court of the United States for the Western District of Oklahoma, which on September 30, 1941, rendered judgment in favor of Seidenbach for the sum of \$4,154.49 together with costs of the action (R. 59), and also made findings of fact and conclusions of law R. 59-62.) From this decision Casualty appealed to the Circuit Court of Appeals for the Tenth Cir-

cuit which on October 27, 1942, reversed the judgment of the District Court of the United States for the Western District of Oklahoma and remanded the case with directions to render judgment in favor of Casualty. (R. 66-70.) A petition for rehearing was filed with the court below, and was denied on December 30, 1942 (R. 73). A second petition for rehearing was filed by leave of the court below and was denied on March 17, 1943. (R. 83.)

The background of the instant case is the litigation in the Oklahoma state courts, as an incident to which the bond here in litigation was executed by Cut Stone and Casualty.

In July 1927 Seidenbach posted with the court clerk, in order to release the liens against his property, 24 separate deposits aggregating \$58,261.25, representing the aggregate amount of the 24 lien claims. (R. 42.) Before the trial, certain claimants withdrew. During the trial, by stipulation of the parties, \$13,194.15 was deducted from the deposits for the payment of certain costs assessed against the lienors on a pro rata basis. (R. 19.) During the trial, certain claimants were denied any recovery. After the trial there remained 16 claimants and deposits aggregating \$41,668.06.

Of these 16 remaining claimants, six had their claims sustained by the trial court, and, electing not to appeal, were permitted to withdraw from Seidenbach's deposits the respective amounts of their judgments against the deposits, or a total of \$987.52, which then left with the court clerk the sum of \$40,680.54. (R. 15.) The remaining claimants whose judgments totaled \$9,061.01, gave notice of intention to appeal. (R. 13.) Cut Stone was one of these claimants, its judgment being for \$3,184.46. (R. 12.)

In order to stay the execution of the judgment of the trial court, certain of the claimants, including Cut Stone, asked leave to file supersedeas bonds. (R. 34.) On March 24, 1930, the trial court gave those desiring to appeal the option of filing a general supersedeas bond of \$40,680.54, the amount of Seidenbach's deposits then remaining with the

court clerk, or, if they preferred, individual supersedeas bonds in specified amounts. (R. 15.) Five claimants filed individual bonds, that of Cut Stone being for \$12,500, the total of the five being \$34,400. (R. 57.) On April 23, 1930, the trial court entered an order concluding as follows (R. 57):

"It is therefore ordered that the court clerk with whom the defendant, J. L. Seidenbach, has heretofore made the deposits for the discharge of liens, and which at the time of fixing the supersedeas bonds aggregating the sum of \$40,680.54, be and the said clerk is hereby authorized, directed and empowered to pay to said J. L. Seidenbach, defendant, the differences between the aggregate amount of individual bonds filed by the individuals who had given notice of their intention to appeal to the Supreme Court and who requested that the court fix the amount of their bonds and which bonds being so designated, fixed and filed aggregate the sum of \$34,400.00, and the amount of the aggregate sum of \$40,680.54; or the amount of the payment to said J. L. Seidenbach, defendant, of the sum of \$6,280.54; it being the order and intention of the court heretofore that the amount of the supersedeas bonds of the appealing claimants or appellants who gave notice of intention to appeal and requested that bonds be fixed, that the amount of the supersedeas bonds be equal to or in the sum of the amount in cash that said J. L. Seidenbach, defendant, should have on deposit with the court clerk."

The attention of this Court is respectfully invited to certain significant aspects of this order. First, it shows on its face that the appealing claimants asked the trial court to fix the amount of their supersedeas bonds and that they voluntarily filed such bonds. Second, the order very clearly directed the return to Seidenbach of *the difference between the amount in the custody of the court clerk and the aggregate of the five individually posted supersedeas bonds*. Third, it did not make provision for leaving with the court clerk any portion of the deposits made for other appealing claimants who filed no supersedeas bonds

to satisfy the judgments awarded such other claimants. Fourth, the effect of the order was to set aside for Cut Stone \$12,500 which, since the original deposit of that amount by Seidenbach had been depleted by the sum of \$4,511.83 (Cut Stone's pro rata share of the costs) constituted a requirement that Seidenbach put up an additional \$4,511.83 over and above the maximum amount the statute required him to deposit. This money was taken from deposits made by Seidenbach to discharge other lien claims, and as a result of the taking of such money from such other deposits for the benefit of Cut Stone, Seidenbach was later required by the Supreme Court of Oklahoma to make separate and additional provision for the payment of such other claims. No appeal from or exception to this order was ever taken by any party. (R. 37.)

It is in the light of these facts that the Opinion of the Supreme Court of Oklahoma in the case of *Consolidated Cut Stone Co. v. Seidenbach* (181 Okla. 528, 75 P. (2d) 442) must be read, particularly those portions of the Opinion which read as follows:

" * * * After the time allowed for making bond had expired, the trial court entered its order directing the clerk to return to the owner deposits in connection with the lien claims on which no supersedeas bond had been executed. Apparently the order has been complied with. The question arises as to what order this court should make respecting the liens that have been sustained against the cash deposits withdrawn by the owner." (75 P. (2d) 459.)

" * * * we believe that the order in the present case releasing certain of the deposits to the owner was unauthorized. By the judgment of the court the respective liens were established against the deposits, which were substituted for the real estate of the owner. A failure of the lien claimants to give supersedeas bonds would not release liens which the judgment of the trial court established against the owner's realty. Bonds were fixed by the trial court for approximately the amount of the respective claims as filed. The order of the trial court was that all money deposited be returned to the

owner, over and above the amount for which the supersedeas bonds were given. The claim of Patterson Steel Company for \$11,327.89 was denied in full by the trial court, but this claimant gave a supersedeas bond. We think that where the lien claim was denied in full, there might be reason for requiring a supersedeas bond in order to hold the deposit intact, but it is not necessary for us to pass on that point. The statute seems clearly to provide that the deposit is to be the substituted security until the claimant's right to a lien is finally determined. We see no reason why the matter of interest on the deposit that might be due the owner on certain contingencies could not be taken care of by an order of court determining the respective equities. In any event, we think it obvious that the withdrawal of the deposits, where liens were established against them by the judgment of the trial court, was premature where the validity and extent of the liens had not been finally determined.

"We conclude, therefore, that the proper order is that the defendant in error, J. L. Seidenbach, be directed to redeposit with the court clerk such sums as were withdrawn by him and are necessary to discharge the liens as established by the judgment of the trial court and affirmed by this court. And such is our order." (75 P. (2d) 460.)

The syllabus by the Court as to this point reads:

"8. Where a lien is established against the cash deposit made under section 10980, O. S. 1931, 42 Okl. St. Ann. § 147, to discharge the owner's property from such lien, a withdrawal of such cash deposit by the owner before the lien claim is finally adjudicated is unauthorized." (75 P. (2d) 444.)

In this action begun by Seidenbach against Casualty, the District Court of the United States for the Western District of Oklahoma found for Seidenbach. In reversing the judgment, the Court below said (R. 70):

"* * * The Supreme Court in *Stone Company v. Seidenbach*, supra, held that Seidenbach was not entitled to a return of any part of the deposits until the validity

and extent of the liens had been finally determined, and that it was not necessary for the lien claimants to give supersedeas bonds to stay the return to Seidenbach of the excess in the respective deposits over the amounts awarded the lien claimants, respectively, by the District Court."

It is to be noted that this comment of the court below is not borne out by any language of the Supreme Court of Oklahoma, either in its Opinion or in its syllabus. The language of the Supreme Court, on the contrary, shows clearly that it was seeking to protect lien claimants who had filed no supersedeas bonds and whose deposits had been *entirely* withdrawn. This misconstruction by the court below of the State Court's decision was called to the attention of the court below in Seidenbach's two petitions for rehearing, which were denied.

SPECIFICATION OF ERRORS TO BE URGED.

The court below erred:

1. In finding "Pending the appeal, and after the time fixed for filing supersedeas bonds had expired, the trial court directed the clerk to return to Seidenbach the amounts of the deposits made to discharge liens of claimants who had failed to file supersedeas bonds, in excess of the amounts awarded such lien claimants, respectively.";

2. In holding "Sec. 10980, *supra*, makes no provision for the payment to the owner of interest on the deposit in excess of the amount required to satisfy the lien as finally established.";

3. In holding "The Supreme Court in *Stone Company v. Seidenbach*, *supra*, held that Seidenbach was not entitled to a return of any part of the deposits until the validity and extent of the liens had been finally determined, and that it was not necessary for the lien claimants to give supersedeas bonds to stay the return to Seidenbach of the excess in the respective deposits over the

amounts awarded the lien claimants, respectively, by the District Court.”;

4. In holding “It follows that Seidenbach was not entitled to recover interest on that portion of the deposit made to discharge the lien of the Stone Company directed to be returned to Seidenbach by the judgment of the District Court of Tulsa County of March 8, 1930.”;

5. In its conclusion that “The bond did not obligate the principal and surety to pay interest on that amount.”;

6. In its holding that “It obligated them to pay any loss of interest suffered by Seidenbach. Since Seidenbach was not entitled to interest, he suffered no loss or damage and the condition of the bond was not breached.”;

7. In considering the question of whether the trial court’s order requiring the bond was invalid;

8. In holding that such order was invalid;

9. In considering whether or not Seidenbach would have been legally entitled to the return of the portion of his deposit over and above the amount of the judgment awarded the lien claimant in the absence of a stay order by the trial court.

10. In holding that he would not have been entitled to the return of such portion of the deposit.

11. In failing to hold that the trial court’s order improperly required Seidenbach to deposit an additional \$4,511.83 over and above the maximum amount required by statute, and that Seidenbach was entitled to indemnification for the loss of use of such amount.

12. In reversing the judgment of the District Court of the United States for the Western District for Oklahoma.

REASONS FOR GRANTING THE WRIT.

1. The court below, as is demonstrated by its opinion, based its judgment upon a holding that an order of the Oklahoma District Court of Tulsa County, which order was not appealed from or excepted to in any further proceedings in the state courts of Oklahoma and was therefore *res adjudicata* as between petitioner and respondent, was an invalid order. This action of the court below in constituting itself as a court of appellate review over the state courts of Oklahoma and holding that an order of such courts which was final and binding as between the parties could be held to be invalid in a suit on a bond filed pursuant to such order, involves usurpation of jurisdiction over and interference with the state courts of Oklahoma and results in such a miscarriage of justice as to call for the exercise of this Court's supervisory powers.

The order of the District Court of Tulsa County staying execution of its judgment conditioned upon the filing of the bond on which this litigation is predicated, was entered on the 22nd day of March, 1930. It was never appealed from or excepted to by the petitioner, the respondent, or the principal in the appeal which the principal on such bond took to the Supreme Court of Oklahoma to review the judgment itself or in any other proceedings prior to the institution of the present suit on the bond. As between the parties to this litigation it is *res adjudicata* and therefore not open to attack in the federal courts to which respondent removed this litigation. The action of the court below in questioning the validity of the stay order and holding the condition of such order requiring the filing of a bond invalid, constitutes an invasion of the province of the state courts of Oklahoma in which courts alone could the question have been raised, and then only in an appropriate and timely appeal. The conflict between the federal and state judiciary involved in this procedure requires the exercise of this Court's supervisory powers, particularly since, as shown below, the decision of the court below was erroneous

and a miscarriage of justice will result if this judgment is permitted to stand.

2. The court below improperly construed provisions of an important Oklahoma statute in such a manner as will hinder and obstruct the orderly and effective administration and operation of such statutes.

The Oklahoma discharge of lien statute (Section 10980) which sets up a procedure for the discharge of a materialman's lien by the deposit into a state court of the full amount claimed, provides that appeals from the judgment of the trial court may be taken and prosecuted in the same way as appeals in other cases. It contains no provision that where an appeal is taken the judgment of the trial court is automatically stayed whether the lien claimant or the owner prevails in the trial court. There is no warrant in the language of the statute or in precedent for the holding that a judgment giving a lien claimant a portion of the amount he has claimed and directing return of the balance of a deposit to the owner is automatically stayed pending an appeal to the Oklahoma Supreme Court.

It is obvious that if an owner making a deposit under the Oklahoma discharge of lien statute in order to discharge a property lien in the full amount of the lien claim cannot withdraw any portion of such deposit until the case has been appealed to and decided by the Supreme Court of Oklahoma, even where a trial court's judgment had fixed the amount of the lien as being considerably less than the amount claimed and the amount deposited, the interest costs during the appeal running against the owners will be a very considerable factor in determining whether he should settle for an amount in excess of the judgment or contest the appeal. The importance of this point in the operation of the Oklahoma discharge of lien statute is readily apparent. It is no less apparent that if a different result obtains when execution of a judgment is stayed upon the filing of a supersedeas bond with an in-state bonding company as surety than will be obtained if an out-state bonding company is surety, because of the difference in holdings in the

federal courts and the Oklahoma state courts, the intention of the Oklahoma Legislature would not only be completely nullified but a chaotic situation will result.

3. The court below interpreted provisions of Oklahoma statutes in a manner which is in conflict with applicable decisions of the Supreme Court and inferior courts of the State of Oklahoma.

The decision of the Supreme Court of Oklahoma recognized the fact that a supersedeas bond may properly be required to stay the execution of a judgment such as the one entered by the trial court in the case of *Consolidated Cut Stone v. Seidenbach*. This recognition by the Supreme Court is not merely implicit in its decision but was expressly recognized in the case of *Mary Warner*, one of the lien claimants, in which the Supreme Court during the pendency of the appeal required the claimant to execute a new bond of the same character as the one here involved because of the inadequacy of the surety on the original bond. (R.38.) The language of the Supreme Court of Oklahoma quoted by the court below, and which was relied upon by the court below to sustain its conclusion that no such bond could properly be required, dealt with an entirely different factual situation. It was there concerned with the problem presented where the trial court had permitted withdrawal of the entire amount deposited despite the fact that it had awarded judgment to a lien claimant of a portion of such deposit. The Supreme Court on those facts held that the withdrawal of the *entire* deposit was unauthorized, since a lien against a portion had been established by the judgment of the trial court. It did not advert to the question whether a withdrawal of the excess of the deposit over the amount awarded by the judgment would have been proper, but entered an order requiring that the owner redeposit an amount sufficient only to cover the judgment award which was considerably less than the amount originally claimed.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

WILLIAM J. DEMPSEY,
Bowen Building,
Washington, D. C.,
Attorney for Petitioner.

DEMPSEY & KOPLOVITZ,
Bowen Building,
Washington, D. C.
Of Counsel.

June 16, 1943.